FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

February 4, 1998

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE COUNTRY CLUB FOODS, INC. I, doing business as Country Crisp Foods, doing business as Country Club Foods, doing business as Clover Club Foods, Debtor.	BAP No. UT-97-033
HARLEY NELSON, Appellant, v. COUNTRY CLUB FOODS, INC. I, Appellee.	Bankr. No. 95-26379 Chapter 11 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Utah

Before McFEELEY, Chief Judge, PUSATERI, and MATHESON, Bankruptcy Judges.

MATHESON, Bankruptcy Judge.

This Court has before it for review the order of the United States Bankruptcy Court for the District of Utah that authorized the Debtor's rejection of certain Distributor Agreements. For the reasons set forth below, we conclude

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

that the decision of the Bankruptcy Court should be affirmed.

JURISDICTION AND STANDARD OF REVIEW

A Bankruptcy Appellate Panel, with the consent of the parties, has jurisdiction to hear appeals from final judgments, orders, and decrees of bankruptcy judges within this circuit. 28 U.S.C. §158(a), (b)(1), (c)(1). As neither party has opted to have this appeal heard by the District Court for the District of Utah, they are deemed to have consented to jurisdiction. 10th Cir. BAP L.R. 8001-1(c).

The Bankruptcy Appellate Panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree, or remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous. Fed. R. Bankr. P. 8013; ***see First Bank v. Reid (In re Reid)***, 757 F.2d 230, 233-34 (10th Cir. 1985). The clearly erroneous standard does not apply to the bankruptcy court's conclusions of law. Conclusions of law are reviewed ***de novo***. ***Pierce v. Underwood***, 487 U.S. 552, 558 (1988).

BACKGROUND

The record before us, such as it is, reflects that the Debtor was a party to certain Distributor Agreements.[1] The Debtor filed a motion seeking an order authorizing the rejection "of Distribution Agreements." Attached to that motion were two specimen agreements and a list of the parties with whom the Debtor had entered into such agreements, which list included the Appellant.

The Appellant filed an objection to the Debtor's motion. In that objection he asserted that there were other agreements involved. In particular, he argued that he had acquired his interests in the Distributor Agreement by way of purchase and a bill of sale. While he appears to acknowledge that the Distributor

[1] All of the assets of the Debtor were transferred to the Country Club Foods, Inc. I Creditors' Trust on July 1 of this year. Although there has been no motion to substitute parties, it appears that Gil A. Miller, the trustee of this trust, is now the real party in interest and the appellee in this appeal.

Agreement is an executory contract, he also asserts that his purchased rights were not executory and were not subject to rejection. Copies of the various supplemental documents were attached to the objection.

A hearing was held on the Debtor's motion. The Appellant thought the court did not need a transcript of this hearing to consider his appeal and so did not include one in the record on appeal. The Appellee asserts, and the Appellant has not denied, that the Appellant did not appear at the hearing and, thus, did not introduce any evidence. Having heard the evidence that was presented, the court granted the Debtor the relief requested and entered a written order authorizing the Debtor's rejection of the Distributor Agreements pursuant to the findings and conclusions made on the record. This appeal followed.

DISCUSSION

It is the function of this Court to review the orders and judgments of the bankruptcy court. In order to do so, we must be provided an adequate record of the proceedings below for our review, and it is the obligation of the Appellant, in the first instance, to provide such a record. Fed. R. Bankr. P. 8006. The Appellant has wholly failed to do so.

The Appellant concedes that the Distributor Agreements are executory contracts. The argument is that the bankruptcy court erroneously granted the Debtor's motion to reject the contracts. In particular, the Appellant argues that rejection imposes a disproportionate burden on him.

The problem with the Appellant's argument is that there is no appellate record to support it. The Appellant apparently did not introduce any evidence at the hearing before the bankruptcy court and has failed to lodge a transcript of the hearing below. Thus, this Court cannot review the decision of the bankruptcy court to determine whether the order granting the Debtor's motion was proper. ***United States v. Vasquez,*** 985 F.2d 491 (10th Cir. 1993); ***Moore v. Subaru of America,*** 891 F.2d 1445 (10th Cir. 1989); ***United States v. Tedder,*** 787 F.2d 540

(10th Cir. 1986).

The Appellant also seeks to argue that he has rights under another agreement that is not executory, and thus is not subject to rejection. However, because the Appellant did not provide the court with a transcript showing that he appeared at the hearing on the Debtor's motion, and did not introduce his documents into evidence, they are not part of the record other than as exhibits to the objection he filed. Attaching documents to a pleading does not make them part of the record before the trial court. If, as it appears, they were never presented to the bankruptcy court as a part of the evidentiary record at the hearing on the Debtor's motion, this Court probably could not determine whether the agreements were, or were not, executory, even if we had an adequate record for review.

The lack of an adequate record means that this Court has nothing to review. Accordingly, the order of the bankruptcy court must be affirmed.

There is a further reason why the decision of the bankruptcy court must be affirmed. The record reflects that the Debtor entered into an agreement during its Chapter 11 case that called for the sale of all of the Debtor's assets pursuant to a plan of reorganization. The plan was confirmed, the order confirming the plan was not appealed nor stayed, the plan has been consummated, and the Debtor's assets have been sold. Reversing the order authorizing the rejection of the Distributor Agreements at this time would leave the Appellant with a Distributor Agreement with an entity that is out of business. This is a meaningless result. Therefore the appeal must be dismissed because of the lack of any effective remedy other than the Appellant's claims for damages for the rejection of his contract, executory or not. ***Dais-Naid Inc. v. Phoenix Resource Cos., Inc. (In re Texas Int'l Corp.)***, 974 F.2d 1246 (10th Cir. 1992); ***King Resources Stockholders' Protective Comm. v. Baer (In re King Resources Co.)***, 651 F.2d 1326 (10th Cir. 1980); ***In re Rock Indus. Mach. Corp.***, 572 F.2d 1195, 1199

(7th Cir. 1978).

The Appellee has filed a motion seeking summary disposition of this appeal on the grounds that it is moot. The Court's dispositon of the appeal as stated above makes that motion moot.

For the reasons stated, the order of the bankruptcy court authorizing the rejection of the Distributor Agreements is AFFIRMED.